STATE OF MICHIGAN

COURT OF APPEALS

IZOLA JOHNSON, Guardian of TAMARA JOHNSON, a Legally Incapacitated Person,

Plaintiff-Appellee,

v

JANISSA LAPRI SMITH and LAKITA LAPRI SMITH,

Defendants,

and

DEARING CO., INC. d/b/a BERT'S MARKET PLACE,

Defendant-Appellant.

UNPUBLISHED
December 17, 2013

No. 312086
Wayne Circuit Court
LC No. 09-027567-NI

Before: METER, P.J., and CAVANAGH and SAAD, JJ.

PER CURIAM.

Defendant, Dearing Co., Inc., appeals by leave granted an order granting plaintiff's motion for reconsideration and reversing the trial court's previous order granting summary disposition in defendant's favor pursuant to MCR 2.116(C)(10).[1] We reverse and remand for reinstatement of the trial court's previous order granting summary disposition in defendant's favor.

Defendant argues that the trial court abused its discretion by reconsidering and reversing its previous order after concluding that plaintiff presented sufficient evidence to create a question of fact regarding visible intoxication. We agree.

A trial court's ruling on a motion for reconsideration is reviewed for an abuse of discretion. *Tinman v Blue Cross & Blue Shield of Mich*, 264 Mich App 546, 556-557; 692

[1] We refer to Dearing Co., Inc. as "defendant" and Tamara Johnson as "plaintiff" in this opinion.

NW2d 58 (2004). An abuse of discretion occurs when the lower court's decision falls outside the principled range of outcomes. *Auto-Owners Ins Co v Keizer-Morris, Inc*, 284 Mich App 610, 612; 773 NW2d 267 (2009). "A court by definition abuses its discretion when it makes an error of law." *In re Waters Drain Drainage Dist*, 296 Mich App 214, 220; 818 NW2d 478 (2012).

A motion for summary disposition under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Joseph v Auto Club Ins Ass'n*, 491 Mich 200, 206; 815 NW2d 412 (2012). Summary disposition "is appropriate if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." *Id*.; see also MCR 2.116(C)(10). This Court "review[s] a motion brought under MCR 2.116(C)(10) by considering the pleadings, admissions, and other evidence submitted by the parties in the light most favorable to the nonmoving party." *Latham v Barton Malow Co*, 480 Mich 105, 111; 746 NW2d 868 (2008).

MCL 436.1801(2) provides that "[a] retail licensee shall not . . . sell, furnish, or give alcoholic liquor to a person who is visibly intoxicated." MCL 436.1801(3) provides:

> [A]n individual who suffers damage or who is personally injured by a minor or visibly intoxicated person by reason of the unlawful selling, giving, or furnishing of alcoholic liquor to the minor or visibly intoxicated person, if the unlawful sale is proven to be a proximate cause of the damage, injury, or death, or the spouse, child, parent, or guardian of that individual, shall have a right of action in his or her name against the person who by selling, giving, or furnishing the alcoholic liquor has caused or contributed to the intoxication of the person or who has caused or contributed to the damage, injury, or death.

In *Reed v Breton*, 475 Mich 531; 718 NW2d 770 (2006), our Supreme Court discussed the threshold requirements of a prima facie case under MCL 436.1801(3). "[T]o establish 'visible intoxication' under MCL 436.1801(3), a plaintiff must present evidence of actual visible intoxication." *Reed*, 475 Mich at 534. "Plaintiffs already bear the burden of establishing a prima facie case against any defendant in a dramshop claim, including showing the element of serving alcohol to a visibly intoxicated person. Under MRE 301, demonstrating a prima facie case itself remains subject to the standard of competent and credible evidence." *Id*. at 539. As the *Reed* Court explained:

> This standard of "visible intoxication" focuses on the objective manifestations of intoxication. *Miller v Ochampaugh*, 191 Mich App 48, 59-60; 477 NW2d 105 (1991). While circumstantial evidence may suffice to establish this element, it must be actual evidence of the *visible* intoxication of the allegedly intoxicated person. Other circumstantial evidence, such as blood alcohol levels, time spent drinking, or the condition of other drinkers, cannot, as a predicate for expert testimony, alone demonstrate that a person was *visibly* intoxicated because it does not show what behavior, if any, the person *actually manifested* to a reasonable observer. These other indicia—amount consumed, blood alcohol content, and so forth—can, if otherwise admissible, reinforce the finding of visible intoxication, but they cannot substitute for showing visible intoxication in the first instance. While circumstantial evidence retains its value, such (and any other type of)

> evidence must demonstrate the elements required by [MCL 436.1801(3)], including "visible intoxication." [*Id*. at 542-543 (emphasis in original).]

In *Reed*, Curtis Breton, the allegedly intoxicated person, spent his day drinking alcohol with a friend. *Id*. at 534. At approximately 7:30 p.m., Breton drank two beers at the defendant's establishment. *Id*. To demonstrate visible intoxication, the plaintiffs in *Reed* produced the expert opinion reports of two toxicologists. *Id*. at 536. These reports estimated the number of drinks Breton had consumed. *Id*. Based on Breton's blood alcohol content and his physical makeup, the toxicologists opined that Breton must have been visibly intoxicated when he was served by the defendant's establishment. *Id*. Our Supreme Court held that the plaintiffs had not presented competent and credible evidence to support their claim that Breton was visibly intoxicated at the time he was served at the defendant's establishment. *Id*. at 542-544. The Court stated:

> Plaintiffs further relied on two expert toxicologists' expectations that Breton would have exhibited signs of intoxication. But reports discussing Breton's physical statistics and alcohol consumption, coupled with predictions of his impairment, offer only speculation about how alcohol consumption affected Breton that night. Expert post hoc analysis may demonstrate that Breton was *actually* intoxicated but does not establish that others witnessed his *visible* intoxication. Consequently, no basis for a [dramshop act] claim against defendant existed. Because plaintiffs failed to establish a genuine issue of material fact that Breton was visibly intoxicated even under [MCL 436.1801(3)], the trial court correctly granted summary disposition for defendant. [*Id*. at 543 (emphasis in original).]

In the present case, plaintiff has, likewise, presented insufficient evidence to create a question of fact regarding whether Lakita Smith, the allegedly intoxicated person, was visibly intoxicated when she was served alcohol by defendant. Plaintiff primarily relies upon several pieces of evidence that the *Reed* Court determined were insufficient to support such a claim. Plaintiff first refers to the time period of consumption, approximately two hours, and that Smith had consumed five to six drinks. Plaintiff also refers to her own physical condition, including that she was intoxicated, stumbling at defendant's establishment, and lost consciousness while Smith was driving her home. However, *Reed* makes it clear that evidence of the amount of alcohol consumed, the time period of consumption, and the physical condition of others "cannot substitute for showing visible intoxication in the first instance." *Reed*, 475 Mich at 543. Thus, this evidence alone does not establish actual visible intoxication under the "competent and credible" standard applicable to MCL 436.1801(3). *Id*.

And the fact that no more than three bartenders served plaintiff and Smith at defendant's establishment does not tend to prove that Smith was visibly intoxicated. Plaintiff argues that this is a relevant fact because these bartenders would know exactly how many drinks had been served. However, as discussed in *Reed*, the amount of alcohol consumed does not, by itself, support a prima facie claim of visible intoxication. *Reed*, 475 Mich at 543. Thus, even if the bartenders were aware of how many drinks Smith had consumed, their knowledge does not demonstrate that Smith was visibly intoxicated because it is not "actual evidence of the *visible* intoxication of the allegedly intoxicated person." *Id*. at 542 (emphasis in original). This

evidence "does not show what behavior, if any, the person *actually manifested* to a reasonable observer." *Id*. at 542-543 (emphasis in original).

The remaining facts discussed by plaintiff do not create a question of fact regarding whether Smith was actually visibly intoxicated. More specifically, Smith being a female, the time and nature of the motor vehicle accident, and Smith's alleged statement at the hospital to plaintiff that "we drank too much" do not reflect any objective manifestations that would create a question of fact regarding whether Smith was actually visibly intoxicated when she was served alcohol by defendant. That is, none of these proffered pieces of evidence demonstrate "what behavior, if any, the person *actually manifested* to a reasonable observer." *Id*. (emphasis in original). Thus, this evidence is not sufficient to make out a prima facie case of visible intoxication. *Id*.

The only evidence that tends to show what objective manifestations of intoxication Smith presented comes from plaintiff's own deposition testimony:

> *Q.* Do you remember her in the bar, this being [Smith], while you are still at [defendant's establishment], did you ever get a chance to see her walk?
>
> *A.* Walk in the bar?
>
> *Q.* Yes.
>
> *A.* Walking out [sic] the bar?
>
> *Q.* In the bar, still in the bar.
>
> *A.* Yeah, she was straight, that's why I didn't believe she was drunk like that, but that's why I believed her and trusted her to get us home safe.
>
> *Q.* Is it fair to say she didn't show you any signs in the bar that she was drunk?
>
> *A.* She probably did show me some signs, but I am intoxicated, so I'm not really paying attention.
>
> *Q.* Listen to my question. I know you're saying what she probably did, but as we sit here today, you can't tell me any signs that she exhibited in the bar that said she was drunk, is that correct?
>
> *A.* Correct.
>
> * * *
>
> *Q.* How about [Smith], did she get sick at the bar?
>
> *A.* No, she didn't.
>
> *Q.* Did she fall asleep at the bar?

A. No, she didn't.

Q. Did you get in any fights at the bar?

A. No, we did not.

Q. Neither of you, neither you nor [Smith], correct?

A. No.

Plaintiff's own testimony clearly states that plaintiff, who had been drinking with Smith since 11:45 p.m., could not testify to any signs that Smith was intoxicated. Plaintiff argues that this testimony is evidence that Smith *was* visibly intoxicated, because plaintiff's intoxication should not be used against her when defendant was the source of that intoxication. This argument is without merit. Plaintiff's argument does not recognize that it is her burden to present evidence of visible intoxication, not defendant's burden to disprove visible intoxication. See *Reed*, 475 Mich at 533, 542-544. Plaintiff's statement that Smith "probably did" exhibit signs of intoxication is unpersuasive, given plaintiff's admission that she could not testify to any actual signs of intoxication. Further, plaintiff testified that Smith did not fall asleep at the bar, did not get sick at the bar, and did not become involved in any altercations at the bar. Thus, the only objective evidence bearing on the issue whether Smith was visibly intoxicated leads to the conclusion that she was not.

The trial court erred by relying upon *McKenzie v Estate of Taft*, 434 Mich 858; 450 NW2d 266 (1990), in its reconsideration order. In *McKenzie*, our Supreme Court entered an order denying leave to appeal. *Id*. A denial of leave to appeal has no precedential value. MCR 7.302(H)(3); see also *Nuculovic v Hill*, 287 Mich App 58, 68; 783 NW2d 124 (2010). In *McKenzie*, Justice Levin wrote separately to state his disagreement with the Court's order. In his view, "a reasonable inference of visible intoxication could properly be drawn from the circumstantial evidence." *McKenzie*, 434 Mich at 861 (dissenting statement of Levin, J.). This evidence consisted of the intoxicated individual's blood alcohol content, deposition testimony regarding the number of alcoholic beverages consumed by the intoxicated individual, and expected testimony from a medical pathologist who would testify that, given the individual's blood alcohol content, he must have displayed signs of intoxication. *Id*. at 859 (dissenting statement of Levin, J.). However, any reliance on Justice Levin's opinion is misplaced because it did not garner the support of a majority of the Court and, therefore, is not binding precedent. See *Spectrum Health Hospitals v Farm Bureau Mut Ins Co of Mich*, 492 Mich 503, 535; 821 NW2d 117 (2012). In contrast, our Supreme Court's opinion in *Reed* is binding precedent because a majority of the Court joined the opinion. *Id*. Even if Justice Levin's statement in *McKenzie* had any precedential value, it would directly conflict with the Court's binding decision in *Reed*, which found that nearly identical evidence was not sufficient to establish visible intoxication. *Reed*, 475 Mich at 543-543; cf. *McKenzie*, 434 Mich at 859, 861 (dissenting statement of Levin, J.). Thus, the lower court erred by relying upon *McKenzie*.

Further, the trial court's blanket assertion that "[v]isible intoxication may be proven by circumstantial evidence and the permissible inferences drawn therefrom[,]" misstates plaintiff's evidentiary burden. "While circumstantial evidence may suffice to establish [visible

intoxication], it must be actual evidence of the *visible* intoxication of the allegedly intoxicated person." *Reed*, 475 Mich at 542. Plaintiff must do more than produce *any* circumstantial evidence. Plaintiff must show "what behavior, if any, the person *actually manifested* to a reasonable observer." *Id*. at 542-543 (emphasis in original). Only after making this initial showing may plaintiff rely upon the kinds of circumstantial evidence she has presented. *Id*. at 543. The trial court erred as a matter of law when it determined that plaintiff's proffered evidence created a question of fact regarding whether Smith was visibly intoxicated. See *id*. at 533, 542-543. Thus, the trial court abused its discretion when it granted reconsideration of, and reversed, its previous order granting defendant summary disposition. See *In re Waters Drainage Dist*, 296 Mich App at 220.

In light of our resolution of the above issue, it is unnecessary to decide if a genuine issue of material fact exists regarding whether defendant's conduct was the cause in fact of plaintiff's injuries. Accordingly, we remand this matter for reinstatement of the trial court's previous order granting summary disposition in defendant's favor.

Reversed and remanded for reinstatement of the trial court's previous order granting summary disposition in defendant's favor. We do not retain jurisdiction.

/s/ Patrick M. Meter
/s/ Mark J. Cavanagh
/s/ Henry William Saad